

**To:** CN=Jared Blumenfeld/OU=R9/O=USEPA/C=US@EPA[]  
**Cc:** ryerson.epa@epa.gov[]  
**From:** CN=Karen Schwinn/OU=R9/O=USEPA/C=US  
**Sent:** Wed 12/15/2010 10:42:52 PM  
**Subject:** News articles on Wanger's Delta Smelt decision  
<http://www.fresnobee.com/2010/12/14/2197812/judge-orders-smelt-plan-rewrite.html#storylink=misearch>  
<http://www.sacbee.com/2010/12/14/3257847/federal-judge-orders-rewrite-of.html>  
[http://www.mercurynews.com/breaking-news/ci\\_16859592?source=rss&nclink\\_check=1](http://www.mercurynews.com/breaking-news/ci_16859592?source=rss&nclink_check=1)  
[http://www.latimes.com/news/science/environment/la-me-water-smelt-20101215,0,4288709.story?track=rss&utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+latimes%2Fnews%2Fscience%2Fenvironment+%28L.A.+Times+-+Environment%29&utm\\_content=Google+Reader](http://www.latimes.com/news/science/environment/la-me-water-smelt-20101215,0,4288709.story?track=rss&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+latimes%2Fnews%2Fscience%2Fenvironment+%28L.A.+Times+-+Environment%29&utm_content=Google+Reader)  
<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/12/14/BAKO1GQMTH.DTL&feed=rss.bayarea>  
[http://www.nytimes.com/2010/12/15/science/earth/15delta.html?\\_r=1&partner=rss&emc=rss](http://www.nytimes.com/2010/12/15/science/earth/15delta.html?_r=1&partner=rss&emc=rss)

Here are several of the articles, including the Chronicle one which you asked for. NY Times is worth reading.

and BTW, both the State BDCP "transition" document and the federal Action Plan Update were issued today.

And we just did our ANPR briefing for CEQ, OMB and other feds back east - I think it went well.

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KAREN SCHWINN  
Associate Director  
Water Division  
U.S. EPA Region 9  
75 Hawthorne Street (Wtr-1)  
San Francisco, CA 94105  
415/972-3472  
415/297-5509 (mobile)  
415/947-3537 (fax)  
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Federal judge rejects parts of plan to protect Delta smelt  
Fresno Bee

Federal judge orders rewrite of delta smelt plan  
Sacramento Bee

Judge says Delta pumping rules, meant to protect fish, are too restrictive  
Contra Costa Times

Judge dismisses delta smelt protections  
L.A. Times

U.S. agency's smelt plan 'arbitrary,' judges rules  
S.F. Chronicle

Effort Falters on San Francisco Bay Delta  
N.Y. Times

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Federal judge rejects parts of plan to protect Delta smelt  
Fresno Bee-12/15/10  
By John Ellis

A federal judge in Fresno on Tuesday invalidated key parts of a much-debated plan to protect the threatened Delta smelt. The ruling will likely force the federal government to rewrite the plan for the second time in less than four years.

U.S. District Judge Oliver Wanger's 225-page decision found that while pumping from the Sacramento-San Joaquin Delta hurt the smelt, the restrictions set up to protect the fish were not justified.

The ruling also said the U.S. Fish and Wildlife Service didn't follow its own regulations, which require the agency to study whether the pumping reductions are economically and technologically feasible.

The judge has been harshly criticized by water users for some preliminary rulings that favored the environmental protections. On Tuesday, plaintiffs who had sued to overturn the plan applauded his latest decision.

The ruling is a "step closer to accomplishing California's co-equal goals of restoring the Delta environment and ensuring that the public will have an adequate and reliable water supply," said Tom Birmingham, general manager of the Westlands Water District.

The politically conservative Pacific Legal Foundation – which joined the smelt battle when it filed a separate lawsuit on behalf of three San Joaquin Valley farming operations – issued a statement from attorney Damien Schiff that said Wanger was "correct to recognize" that the smelt plan "involved a lot of junk science."

While the ruling looks to be a victory for agricultural water users and their urban water district allies, the ruling also turned back a number of their legal challenges.

And even though significant portions of the smelt plan will likely have to be rewritten, it doesn't necessarily mean more water for Los Angeles and Bay Area water agencies and agricultural users on the San Joaquin Valley's west side.

These water users have battled environmental groups who sought to keep the smelt plan in place, saying it was vital to protect the tiny fish.

"We're disappointed that the judge found the number of flaws that he did with the (smelt plan)," said George Torgun, an attorney with Earthjustice, which is one of the groups fighting for the smelt protections. "We think it was based on sound science."

Still, Torgun said he was pleased that Wanger continued to agree with the contention of environmentalists and the federal government that Delta pumping operations do hurt the tiny fish.

Wanger has issued several preliminary rulings in the case, but this was the big decision that both sides had awaited. It came more than four months after the oral arguments in the case.

But this is unlikely the final word in the long-running battle – which Wanger's ruling called a "continuing war over protection of the delta smelt" – that has pitted environmentalists against the urban and agricultural users that depend on the Delta for their water supply.

For starters, Wanger has ordered both sides to convene Jan. 4 to see what, if anything, needs to be done while the Fish and Wildlife Service rewrites the smelt plan.

This will likely lead to more arguments between the two sides, and possible orders from Wanger affecting smelt-related pumping restrictions that could kick in as early as this month.

In addition, any new smelt plan could face more court challenges from either environmentalists or water users.

And there is also the parallel issue of endangered salmon, which also have a protection plan that is being challenged by water users. Arguments in that case are scheduled Thursday and Friday before Wanger.#

<http://www.fresnobee.com/2010/12/14/2197812/judge-orders-smelt-plan-rewrite.html#storylink=misearch>

Federal judge orders rewrite of delta smelt plan  
Sacramento Bee (Associated Press)-12/14/10

A federal judge on Tuesday ordered the U.S. Fish and Wildlife Service to rewrite parts of its plan to protect a tiny, threatened fish that lives in California's freshwater delta.

U.S. District Judge Oliver Wanger said in a 225-page opinion that portions of the guidelines meant to protect the delta smelt and manage water flows from the Sacramento-San Joaquin Delta violated the law.

The opinion covered six cases filed separately by agriculture interests, environmental groups and urban water districts against federal wildlife, land and water managers over plans meant to safeguard the dwindling species, called a biological opinion.

"The 2008 (biological opinion findings) are arbitrary, capricious, and unlawful, and are remanded to Fish & Wildlife for further consideration in accordance with this decision and the requirements of law," Wanger wrote.

He also blamed Fish & Wildlife for conducting "sloppy science and uni-directional prescriptions that ignore California's water needs."

Wanger's opinion does not dispute that the massive pumps used to deliver water to farms in the San Joaquin Valley and Southern California cities have harmed the silvery smelt, which is listed as threatened under the Endangered Species Act.

But he said parts of the 2008 plan needed to be redone to better determine the pumping restrictions' economic effects on farmers and other businesses reliant on water deliveries.

"With the economy struggling and unemployment still soaring, it is welcome to see a judge refusing to rubber stamp extreme, destructive and unjustified environmental regulations," said Damien Schiff, an attorney with the Pacific Legal Foundation, which represented three farmers who say water cutbacks harmed their businesses.

The ruling itself is not expected to have an immediate effect on water deliveries. Attorneys said details of any changes would be decided in future court hearings.

In recent years, court decisions aimed at protecting the smelt have restricted water deliveries from the delta, the inland estuary where the finger-sized fish live, and have spelled major losses for growers in the state's farm belt who rely on the system to irrigate their crops.

The delta is also the heart of California's water delivery system, and provides drinking water for 25 million people. Urban water districts in Southern California welcomed Tuesday's ruling, saying the regulatory restrictions

previously had "crippled" their water supplies.

The delta smelt is considered a bellwether species for the estuary's overall health and is listed as an endangered species in California.

Environmental groups who are fighting for the smelt's protections were buoyed that Wanger's opinion made clear that the pumping was killing the fish, but said it would ultimately lead to more delays while federal scientists conduct more tests and revise their plan.

"While we go back and forth trying to find more perfect information, the estuary keeps declining," said Kate Poole, an attorney with the Natural Resources Defense Council. "And the best result for the environment and the state's water supply is to restore that estuary, so to the extent that this delays that from happening, it's disappointing."#

<http://www.sacbee.com/2010/12/14/3257847/federal-judge-orders-rewrite-of.html>

Judge says Delta pumping rules, meant to protect fish, are too restrictive  
Contra Costa Times-12/14/10  
By Mike Taugher

The same federal judge who helped set in motion protests in California's farm country when he ruled three years ago that Delta pumping limits were too lax to prevent fish from going extinct determined Tuesday the new regulations go too far the other way.

In a sharply worded, 255-page decision, U.S. District Judge Oliver Wanger, of Fresno, concluded: "The public cannot afford sloppy science and uni-directional prescriptions that ignore California's water needs."

He ordered regulators to rewrite significant portions of a permit for massive Delta pumps that deliver water to the Bay Area, San Joaquin Valley and Southern California. The permit sets out a host of rules that are meant to prevent Delta smelt from going extinct.

"We are thrilled with the court's decision," said Thomas Birmingham, general manager of the Westlands Water District, the country's largest irrigation district and the region hardest hit by recent drought.

The ruling, Birmingham said, would send the permit back to regulators for "a thorough overhaul."

Wanger characterized the situation as "the continuing war over protection of Delta smelt "... and associated impacts to the water supply for more than half of the state of California."

Despite the blistering language Wanger used at times, it was unclear how much relief water agencies most affected by the regulations would see. He ordered no immediate changes to the pumping regulations.

His ruling appeared to echo a critique in March by a panel convened by the National Academy of Sciences that found the new Delta smelt permit -- along with a related permit to protect salmon, steelhead and green sturgeon -- was conceptually justified but inadequate in its specifics.

Although he was more critical, Wanger, like the panel of scientists, determined regulators were correct to put limits on how hard the pumps could drive two Delta rivers to run in reverse. But both were critical of how government biologists justified the specific limits they laid out. Wanger ordered the U.S. Fish and Wildlife Service to adjust and better justify those limits.

Similarly, a new restriction that requires more water to flow through the Delta in the fall to reduce salinity was justified but no scientific rationale was given for the specific salinity limits that were set.

"It's disappointing and frustrating -- a lot of sound and fury -- but it might not be as bad as I thought and it might not be as good for the contractors as they think it is," said Doug Obegi, a staff attorney for the Natural Resources Defense Council who worked on the case.

Obegi predicted changes ordered by Wanger would not allow state and federal water projects to return to the record-breaking pumping levels they reached from 2000 to 2007. It is possible, Obegi said, that the rewrite might even result in tighter restrictions.

Wanger also was sharply critical of the permit's assertion that pumping exacerbates other problems in the Delta by altering flow patterns and habitat.

Biologists contend the pumps change the Delta's hydrodynamics in ways that foster undesirable weeds, fish, algae and clams and increase the exposure of fish to pollution. Wanger called those connections "unsupported."

A hearing is scheduled in early January to determine the next steps. After Wanger invalidated the previous permit in 2007, he held a series of technical hearings to set interim pumping limits until a new permit was written in late 2008.

It is unknown whether he will follow the same pattern this time.#

[http://www.mercurynews.com/breaking-news/ci\\_16859592?source=rss&ncklick\\_check=1](http://www.mercurynews.com/breaking-news/ci_16859592?source=rss&ncklick_check=1)

Judge dismisses delta smelt protections

L.A. Times-12/15/10

By Bettina Boxall

A federal judge Tuesday threw out much-disputed delta smelt protections that have cut water shipments to Southern California and the San Joaquin Valley, finding that federal biologists failed to justify aspects of the restrictions.

But the ruling in a long-running legal battle was not a clear-cut victory for water contractors, who lost some of their fundamental arguments against the pumping reductions.

The decision by U.S. District Judge Oliver Wanger means that the U.S. Fish & Wildlife Service will for the second time have to rewrite the endangered species document that regulates operation of the huge state and federal pumps that send water south from the Sacramento-San Joaquin Delta.

Whether the pumping limits will be relaxed in the meantime will not be decided until more court hearings are held early next year.

Both sides in the case saw reason for hope in Wanger's complex 225-page ruling.

Wanger concluded that fish and wildlife's rationale for several of the key pumping limits was flawed, rendering its 2008 biological opinion for smelt arbitrary and capricious. But he also found support for the agency's determination that the pumping operations "are likely to jeopardize the continued existence" of the smelt, a once-abundant native of the delta driven to the edge of extinction.

And the decision supported the agency's reliance on certain delta conditions as triggers for imposing pumping curbs.

"This is a limited victory" for water users, said Natural Resources Defense Council attorney Doug Obegi. "I tend to

think that they will have very similar pumping restrictions in the next round."

But Linus Masouredis, chief deputy general counsel for the Metropolitan Water District of Southern California, said that if the fish and wildlife agency merely tinkers with the existing biological opinion, it will be back in court.

Wanger "identified some major defects," he said, adding that the agency will have to take new studies into account that focus on other factors that have hurt the delta ecosystem.

"I think we will get less onerous restrictions," Masouredis said. "There are other third-party stressors out there that are more important."#

[http://www.latimes.com/news/science/environment/la-me-water-smelt-20101215,0,4288709.story?track=rss&utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+la-times%2Fnews%2Fscience%2Fenvironment+%28L.A.+Times+--+Environment%29&utm\\_content=Google+Reader](http://www.latimes.com/news/science/environment/la-me-water-smelt-20101215,0,4288709.story?track=rss&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+la-times%2Fnews%2Fscience%2Fenvironment+%28L.A.+Times+--+Environment%29&utm_content=Google+Reader)

U.S. agency's smelt plan 'arbitrary,' judges rules  
S.F. Chronicle-12/15/10  
By Kelly Zito

A federal judge has ruled that a landmark 2008 environmental study laying the groundwork for controversial water cutbacks from the Sacramento-San Joaquin River Delta relied on faulty science.

In his much-anticipated decision released Tuesday, U.S. District Judge Oliver Wanger ordered the U.S. Fish and Wildlife Service to re-examine and rewrite its plan for the threatened delta smelt.

The agency's solution for shoring up the collapsing species - namely cutting water exports to California cities and farms - is "arbitrary" and "capricious," the Fresno judge wrote in his 225-page decision.

"Despite the harm visited on California water users, (the Fish and Wildlife Service) has failed to provide lawful explanations for the apparent over-appropriation of project water supplies for species protection," Wanger wrote. "The public cannot afford sloppy science and uni-directional prescriptions that ignore California's water needs."

Tuesday's decision is the latest development in a five-year battle over a species that many see as a stand-in for the beleaguered delta itself.

Twenty-five million Californians rely on the delta for drinking water, as do farmers who each year produce vegetables, fruit, nuts, rice and milk worth billions of dollars. Despite its importance, however, the delta's ecosystem has declined in the last few decades because of pollution, booming urban development, invasive species and increased water demands from agriculture.

But few species have deteriorated as radically as the thumb-size smelt, which smells like cucumber and spawns in the central and southern delta - a location that puts the fish directly in the path of the massive pumps that funnel water to the Bay Area, Central Valley and Southern California.

Wanger's ruling upheld the evidence showing that the delta pumps do indeed trap and kill many delta smelt - a consolation for environmental groups that had fought for pumping cutbacks. However, the judge found fundamental flaws in the scientific analysis on the benefits of trimming water supplies to urban and rural areas and said the federal agency failed to examine the economic impacts of such a policy.

Agricultural water districts, plaintiffs in the case and the most vocal critic of the 2008 Fish and Wildlife Service report - officially termed a "biological opinion" - were delighted with Tuesday's decision.

"With the economy struggling and unemployment still soaring, it is welcome to see a judge refusing to rubber-stamp extreme, destructive and unjustified environmental regulations," said Damien Schiff, attorney for the Pacific Legal Foundation, which backed several farmers in a lawsuit against the federal government. "Bottom line: The people win; junk science loses."

Environmentalists, however, say siphoning more water from the delta will push the smelt - which they term an "indicator species" measuring the estuary's overall health - to oblivion.

"In our view, the biological opinion was based on sound science, and it put in place measures that were needed to protect a species that is on the edge of extinction," said Earthjustice attorney George Torgun.

It is unclear whether Wanger's decision will lift restrictions on water exports from the delta, in part, because wet weather this winter might provide additional flows for the smelt.

Farming and environmental groups, along with the federal and state operators of the delta pumps, are scheduled to meet Jan. 4 in Wanger's courtroom to determine how to proceed.

Tuesday's ruling dates back to a 2005 Fish and Wildlife Service plan for managing a dwindling delta smelt population. That first biological opinion concluded that the pumps in the south delta near Tracy posed no threat to the species. The Natural Resources Defense Council and other environmental groups disagreed and filed suit later that year.

In 2007, Wanger sided with them, invalidating the opinion and ordering the agency to rewrite it.

The next year, the Fish and Wildlife Service reversed itself entirely and declared the pumps "likely to jeopardize" the federally protected smelt. That set the stage for 15 percent to 40 percent water cutbacks from the delta at the same time California was in the grip of a nasty dry spell. As tens of thousands of acres lay fallow in 2008 and 2009, Central Valley farmers and conservative commentators took to calling the situation a "Congress-created California dust bowl."

In 2008, it was the farmers' and urban water districts' turn to file suit against the Fish and Wildlife Service. Tuesday's decision was the culmination of those combined lawsuits.

Officials from the wildlife agency said they were still reviewing Tuesday's ruling and could not comment.#

<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/12/14/BAKO1GQMTH.DTL&feed=rss.bayarea>

Effort Falters on San Francisco Bay Delta  
N.Y. Times-12/14/10  
By Felicity Barringer

A high-stakes effort to remake the San Francisco Bay Delta, the West Coast's largest estuary, is looking as fragile as the degraded delta itself these days.

Four years into the effort, the distance between competing water constituencies has only been widening as self-imposed deadlines come and go.

Farmers and cities in Southern California are pressing for a return to the abundant supply of water delivered through the 1,000-square-mile delta before a drought and legal rulings to protect endangered fish led to constraints two years ago. Environmentalists want ironclad guarantees that threatened fish like the minnow-size delta smelt will not be wiped out for want of water.

The Bay Delta Conservation Plan, a federal and state initiative, would re-engineer the delta to make it safe for native species and would establish a framework for water distribution for the next 50 years. The delta, where California's two largest rivers come together, supplies about one-quarter of the freshwater used by about 23 million Californians.

The goals of the plan are to keep vegetables and fruit trees growing in the Central Valley, taps running in Southern California and native fish swimming in the Sacramento and San Joaquin Rivers and in the briny western reaches of the delta, which the rivers feed and give it its formal name.

But the Westlands Water District, which serves some of the wealthiest and most powerful agricultural interests, has pulled out of the negotiations, saying it doubts it will get the water deliveries it had expected.

"The original purpose was to restore our water supply," said Tom Birmingham, the general manager of the district, which snakes along the western edge of the Central Valley and serves 600 farms, according to its Web site.

The route the water takes is not without risks. Because of 160 years of farming and the construction of 1,100 miles of levees, delta lands have sunk and are now 3 to 20 feet below sea level. Mindful of how Hurricane Katrina devastated New Orleans in 2005, planners are also focusing on the possibility that a big earthquake or storm could break crucial levees and allow saltwater from the bay to inundate the delta, which could shut off a large source of the freshwater supply for months.

Among the proposed solutions to the environmental and engineering issues is a \$13 billion tunnel that would tap into the Sacramento River farther upstream and divert water around the delta. The tunnel, which could be 33 feet in diameter and 33 miles long, would be designed to be more resilient to earthquakes. It could also eliminate the springtime problem of newly hatched young smelt being sucked into giant pumps south of the delta that pull the river water into the distribution system.

Another proposal calls for a canal system to serve the same purpose. And a third calls for installing gates to isolate one of the northernmost channels of the San Joaquin River, setting aside a permanent habitat for fish.

Both Gov. Arnold Schwarzenegger, a Republican, and the incoming Democratic governor, Jerry Brown, support the twin goals of making the supply of water running through the delta reliable and protecting the species that have dwindled.

As Spreck Rosekrans, a delta expert for the Environmental Defense Fund, said, "The reliability of our water systems is key to California's economy."

But Mr. Birmingham said that no agency contracting for water from federal or state projects "is going to spend billions of dollars on the implementation of a program that isn't going to provide benefits to them."

While he did not specify what water deliveries would be adequate, Mr. Birmingham and other Westlands officials had expressed comfort with the option most closely studied, which could ensure that the district gets more than 70 percent of the maximum flows that it contracts for.

In 2009, that flow was reduced to 10 percent of the contracted amount; a political outcry ensued.

The district originally joined in the conservation effort partly to win exemptions from some provisions of the Endangered Species Act. The premise is that helping to create or restore habitat for a species can outweigh the harm imposed by another activity — in this case, transporting water south through the federal and state systems.

The precise relationship between flows of river water and fish mortality is not clear. Still, environmentalists and fishermen note that the years of abundant water for farmers and Southern California cities corresponded to years when fish populations crashed — in the case of the smelt, almost to the vanishing point. (Judge Oliver W. Wanger



of Federal District Court ruled Tuesday that the 2008 federal plan to protect the smelt was critically flawed and sent it back to the Fish and Wildlife Service for reconsideration.)

The work on the Bay Delta Conservation Plan had nonetheless been moving in a direction favorable to Westlands interests for much of the past year, with most of the attention devoted to a set of flow-related criteria that would assure the district of supplies they considered sufficient.

Then, federal and state biologists reported in September that those criteria could deprive the smelt of crucial water flow.

In November, David Hayes, the Interior Department's No. 2 official, made it clear that the finding meant that other formulas, which would probably mean less water for farmers, would have to be studied as well. Westlands officials were furious.

"We were sold a bill of goods once again by the federal government," said Westland's president, Jean Sagouspe. In an interview, he said the scientific process had been "politicized," and he went so far as to call Mr. Hayes a "liar."

Mr. Sagouspe predicted that the loss of Westlands financial support, which has covered more than a third of the planning costs so far, would doom the project. "Nothing will get built if we're out," he said.

In an interview, Mr. Hayes played down the district's move. "I would turn my attention not to talking to them but to continuing the work we're doing," he said, adding that the other major water users are "still at the table."

New actions and announcements from both state and federal officials are possible at any moment.

By agreement and by state law, Westlands had been sharing the cost of the plans with the Kern County Water Agency, which represents wealthy farmers and investors and growing communities to the west of the southern Sierra Nevada, and with the Metropolitan Water District of Southern California. These two agencies might now have to bear future costs with only the help of whatever money can come from the financially squeezed state and federal agencies.

So far the planning costs are expected to exceed \$226 million, however, and more than half of that has already been spent.

"The costs go up significantly if major parties are dropping out," said Jeff Kightlinger, the chief executive of the Southern California district. "While we have not been necessarily as vocal as Westlands, we share the same frustrations."

If the planning process falls apart, Mr. Kightlinger said, the water users might "limp along without a big grand fix but a number of patches."

Environmentalists warn that inaction on the delta ecosystem could imperil aquatic life. At the same time, many acknowledge the need for a solution that also adequately addresses the needs of farms and cities.

"The theatrics of people leaving the negotiating table is just that, it's theatric," said Jon Rosenfield, a biologist with the nonprofit Bay Institute and a member of the restoration plan's steering committee.

"There has to be a conservation and restoration plan for the delta," Mr. Rosenfield said, "that improves the status of the species and provides better water supply reliability for the water users."#

[http://www.nytimes.com/2010/12/15/science/earth/15delta.html?\\_r=1&partner=rss&emc=rss](http://www.nytimes.com/2010/12/15/science/earth/15delta.html?_r=1&partner=rss&emc=rss)

